PUBLIC PROSECUTOR

v.

ZAKARIAH MOHD. YASSIN

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[FT CRIMINAL TRIAL NO. 9 OF 1984]
26 OCTOBER 1987

CRIMINAL LAW AND PROCEDURE: *Dangerous Drugs - Trafficking - Section 39B(2) Dangerous Drugs Act 1952 - Drugs found in accused's drawers in the office - Other workers had access to accused's drawers to keep their things - Whether accused had knowledge of the nature of things kept in the drawers - Question of custody and control - Whether presumption under s. 37(d) can arise if there was no custody and control - Essential requirements of s. 37(d).*

In this case, the accused was charged for an offence, in that on 21 November 1983 at about 8.30 a.m. he was trafficking in dangerous drugs, namely 264.63 gm. of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (Revised - 1980) ("the Act").

Held:

[1] In the light of the evidence adduced by the prosecution and when considering the law, it cannot be said that the cannabis was in the custody of the accused or under his control.

[2] The presumption under s. 37(d) of the Act relied upon by the prosecution cannot operate in this case. Therefore it cannot be presumed that the accused was trafficking in the cannabis in question. In considering the prosecution's case there was also no direct evidence to indicate the accused was trafficking in cannabis. Consequently, the essential requirements of s. 37(d) of the Act have not been proved.

[3] In the circumstances the prosecution had failed to prove a *prima facie* case against the accused in respect of the charge and the accused was accordingly acquitted and discharged.

[Accused acquitted and discharged.]

Cases referred to:
Leow Nghee Lim v. Reg. [1956] 22 MLJ 28
PP v. Ng Ban Foo [1981] MLJ 40

Legislation referred:
Dangerous Drugs Act 1952, ss. 2, 37(d), 39B(2)

For the public prosecutor - P.L. Tan, DPP
For the accused - Mohd. Noor Don; M/s. Radzi Sheikh Ahmad Noor & Farid

JUDGMENT

Zakaria Yatim J:

The charge against the accused is that on 21 November 1983 at about 8.30 a.m. he was trafficking in dangerous drugs, namely 264.63 grams of cannabis, an offence punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (Revised - 1980).

According to the raiding officer, Inspector Mokhtar Hj. Mohd. (PW1), acting on information received, he and three police detectives proceeded to a building at No. 788, Jalan Sentul, Kuala Lumpur on 21 November 1983 at about 8.30 a.m. PW1 met the accused in front of the

building. He searched the person of the accused but found nothing on him. The accused told him that he worked in Salkha Sdn. Bhd. on the same building. The accused was then handcuffed. The accused then took the police to his office, where he showed the police his desk. PW1 asked the accused to open the desk. The accused took out the key to the desk from his right trouser pocket and opened the drawers. From one of the drawers PW1 recovered a bag containing materials suspected to be cannabis. The exhibit was later examined by the chemist, who confirmed that it was cannabis and the weight was 264.63 grams.

Another important witness called by the prosecution was Encik Nordin bin Hashim (PW4) who was the managing director of Salkha Sdn. Bhd. at the material time. He said his company was involved in laying telecoms underground cables. He added that the accused was his executive director. Another executive director was Idris bin Mahadi (PW5). According to PW4, he gave strict instructions to his two clerks about the security of the office. Under cross-examination, PW4 said that before he rented a house in Gombak to accommodate his eighteen labourers, the labourers slept in the office premises. PW4 admitted that the labourers frequently used the accused's desk. In cross-examination, he said:

> I used to see my labourers used the accused's desk (ID1 a) to keep documents or things ... I am not sure how many workers opened the desk to use them. I don't know whether Zakariah (the accused) made duplicate keys for the drawers ...

In re-examination PW4 said:

> I didn't stop the workers from using the desk [in question]. I didn't stop them from doing so because they must have had permissions from the two executives. The problem is I did not allow the workers to keep their whole belongings then what I meant was they were allowed to keep their documents like birth certificates and identity cards and other important documents ... When I said I allowed workers to keep their belongings in the desks, I meant that the two executive directors had given instructions to workers on my approval.

PW4 also told the Court that his eighteen workers assembled in the morning in the office premises and returned to the said premises after work.

It is clear from the evidence adduced by the prosecution (PW4's evidence), that besides the accused, the other workers of Salkha Sdn. Bhd. had free access to the drawers of the accused's desk to keep their things. Since the workers themselves had access to the drawers it cannot be inferred that the accused had knowledge of the nature of the things kept in the drawers. According to PW4 the workers used the drawers even when the accused was not in the office.

In my opinion in the light of the evidence adduced by the prosecution, it cannot be said that the cannabis was in the custody of the accused or under his control. In *Leow Nghee Lim v. Reg.* [1956] 22 MLJ 28, Taylor J in his judgment at p. 29 said:

> There is no presumption of custody. The presumption is from custody. Unless custody was established, the chain of reasoning is broken. Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

At p. 30 of the same judgment the learned Judge said:

> A man must know of the existence of a chattel and have some idea of its whereabouts before he can exercise any control over it.

In *PP v. Ng Ban Foo* [1981] MLJ 40, Gunn Chit Tuan J said:

> I would again with respect, agree with Taylor J's dictum in the said *Leow Nghee Lim's* case that 'control must be proved as a fact and it must arise from the relation of the person to the goods, ...'

From the passages quoted above, it is clear that in this case the cannabis was not in the custody of the accused nor was it under his control. The presumption under s. 37(d) relied upon by the Prosecution cannot operate in this case. See *Leow Nghee Lim v. R. supra*. Accordingly it cannot be presumed that the accused was trafficking in the cannabis in question.

I have also considered the prosecution's case to see whether there is direct evidence to prove the accused was trafficking in cannabis as defined in s. 2 of the said Act. I find no direct evidence to indicate that the accused was trafficking in cannabis.

For the reasons stated above I find that the essential requirements of s. 37(d) have not been proved.

In the circumstances, I find that the prosecution has failed to prove a *prima facie* case against the accused in respect of the charge. The accused is accordingly acquitted and discharged.

Also found at [1988] 1 CLJ 98